Supreme Court, U.S.
FILED

No. _____ 94 648 OCT 11 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

BERNIE AISPURO, Warden,

Petitioner,

v.

TONY MELENDEZ LONGORIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, in the context of a civil rights action, the existence of "clearly established law" for the purposes of determining defendant's qualified immunity defense should be narrowly construed to address with particularity the specific action alleged to violate a federal right.

Assuming that qualified immunity applies to cases in which it is claimed that an official has violated a prisoner's Eighth Amendment rights, whether the "objective legal reasonableness" test enunciated by *Hunter v. Bryant*, 502 U.S. 224 (1991) eliminates the need for inquiry into an official's state of mind required by *Farmer v. Brennan*, ___ U.S. ___, 114 S.Ct. 1970 (1994).

LIST OF PARTIES

Petitioner is Bernie Aispuro, the former warden of California State Prison at Corcoran, California (hereinafter Corcoran).

Respondent is a state prisoner who was convicted of first degree murder in 1982. Respondent was incarcerated at Corcoran at the time he filed the underlying complaint in this matter.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

a. Factual Background 2

b. Procedural Background 6

REASONS FOR GRANTING THE WRIT 9

I PETITIONER DEMONSTRATED THAT QUALIFIED IMMUNITY APPLIED TO HIM BECAUSE THE LAW ALLEGEDLY VIOLATED WAS NOT CLEARLY ESTABLISHED AND PETITIONER ACTED IN AN OBJECTIVELY REASONABLE MANNER 10

TABLE OF CONTENTS – Continued

Page

a. The Law Must Be Defined With Particularity When Determining If It Was Clearly Established For Purposes of a Qualified Immunity Defense 10

b. An Official Is Entitled To Qualified Immunity Where His Conduct Is Objectively Reasonable 14

II THE DOCTRINE OF QUALIFIED IMMUNITY REQUIRES THAT A COURT DETERMINE THE OBJECTIVE LEGAL REASONABLENESS OF AN OFFICIAL'S ACTION WHEN A PRISONER CHALLENGES CONDITIONS OF CONFINEMENT 17

CONCLUSION 23

APPENDIX

Appendix A – Opinion of the Ninth Circuit Court of Appeals .....App. 1

Appendix B – Opinion of U.S. District Court Eastern District of California...App. 5

Appendix C – Appellant's Ninth Circuit Brief on Appeal .....App. 20

TABLE OF AUTHORITIES

Page

CASES

Act Up/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993) 8, 17

Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986) 13

Anderson v. Creighton, 483 U.S. 635 (1987) 10, 11, 12, 13

Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) 18

Davis v. Scherer, 468 U.S. 183 (1984) 11

Elder v. Holloway, 114 S.Ct. 1019 (1994) 19, 20

Exxon Shipping v. Pacific Resources, Inc., 789 F.Supp. 1521 (D. Hawaii 1991) 18

Farmer v. Brennan, 114 S.Ct. 1970 (1994) 20, 21, 22, 23

Harlow v. Fitzgerald, 457 U.S. 800 (1981) 7, 10, 14

Hunter v. Bryant, 502 U.S. 224 (1991) .. 7, 11, 17, 20, 21

Malley v. Briggs, 475 U.S. 335 (1986) 11, 17

Mitchell v. Forsyth, 472 U.S. 511 (1985) 11

Sinaloa Lake Owners Ass'n, Inc. v. Stephenson 805 F.Supp. 824 (C.D. Cal. 1992) 18

Toussaint v. McCarthy, 597 F.Supp. 1388 (E.D. Cal. 1984) 13

Wilson v. Seiter, 501 U.S. 294 (1991) 9, 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. section 1254(1) 1

Eighth Amendment ..... *passim*

U.S. Const. amend. XIII, sec. 1 2

OTHER

Supreme Court Rule 10.1 1

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Bernie Aispuro prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 13, 1994. That opinion holds that qualified immunity does not apply to petitioner since the law was clearly established that prisoners have a right to be safe from assaults by other prisoners; there exists a factual dispute as to whether petitioner acted with deliberate indifference in operating the gang integrated Security Housing Unit (SHU) yards; and the subjective state of mind of petitioner must be determined by a factual inquiry below. Appendix A at 3-4.

OPINION BELOW

The opinion for the Court of Appeals for the Ninth Circuit is unreported and is reprinted in the appendix submitted with this petition. Appendix A. The opinion of the District Court is unreported and is reprinted in the appendix submitted with this petition. Appendix B.

JURISDICTION

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. section 1254(1) and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISION INVOLVED

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. XIII, sec. 1.

STATEMENT OF THE CASE

a. Factual Background

The complaint alleged that at Corcoran respondent was assigned to a gang integrated exercise yard and that, as a result, respondent was the victim of an assault on two occasions. During petitioner's tenure as Warden, Corcoran had an integrated yard policy for inmates housed in the Security Housing Units (SHU). This meant that inmates were not separated for yard exercise according to gang affiliation. Thus, an inmate would be offered the opportunity for yard exercise in a yard where other inmates from different gangs might also be exercising. Appendix C at 26-27.

The exercise yards for the SHU inmates at Corcoran State Prison are pie-shaped, and each is approximately 1,577 square feet in area.[1] Each yard was surrounded by a high cement wall capped by barbed tape. For outdoor exercise in the yards, inmates were released in groups according to their sections. Not all inmates offered yard

[1] The facts presented here are not disputed and are a portion of the Statement of Undisputed Facts taken from petitioner Aispuro's Renewed Motion For Summary Judgment. Authority for each fact is referenced in the motion.

exercise always went to the yard. The yard groups varied in number up to about 20 inmates. Appendix C at 27.

Consistent with the cell assignments, the yard groups included a mixture of inmates of different racial or ethnic backgrounds, including members or affiliates of various gangs, and including inmates who were not affiliated with any gang. Before being released to the yard, and before being returned to the unit from the yard, each inmate was given an unclothed body search and a metal detector search. Appendix C at 27.

When occupied, each yard was under continuous surveillance by a gun officer in the control room immediately above the entrance to the yards. This gun officer was armed at all times with a rifle, and at all times had immediately available to him tear gas grenades and shells which discharged non-lethal wooden baton blocks. The tear gas and the wooden blocks were discharged via a 38mm gun. The standard procedure on the SHU exercise yards in the event of a fight between inmates was for the yard officer to fire the 38mm gun once, discharging tear gas or wooden blocks, then drop it and unsling and ready the H & K rifle which fired 9mm bullets. Usually, once the 38mm gun was discharged, inmates would drop to the ground knowing that the H & K rifle was now at the ready. Appendix C at 27-28.

This generally meant that fights were over after a few punches. As a consequence, injuries from inmate altercations on the SHU yard tended to be superficial. It was rare for serious injuries to occur on the yard. For example, the injuries suffered by respondent as a result of the SHU yard altercations of which he complains (on

2/16/89, 3/21/89, 6/12/89, 7/17/89, and 7/30/89) were nonexistent or minor. No medical treatment was indicated in four of the incidents (3/21/89, 6/12/89, 7/17/89, and 7/30/89). The only treatment for the February 16, 1989, incident was to cleanse the area and apply cool compresses. Appendix C at 28.

When occupied, each yard was also under continuous surveillance by a video camera connected to an operating video recorder, and a video display screen in the control room. This meant that the aggressor and/or participants in any fight could be easily identified by reviewing the videotape, if necessary. Consequently, because of the small yard under constant surveillance, the chance of altercations going unnoticed by staff was almost nonexistent. Appendix C at 28.

Some inmates exercised in very small groups or exercised alone (controlled yard status) because they had been persistent aggressors on the exercise yard, or because of other case factors which dictated that they be handled protectively. Appendix C at 28.

Policy was that known enemies were not released to the same yard together, they were not celled together, and were not celled in the same tier, or same section. Such an enemy would be an individual whom the inmate specifically identified, such as by name and prison number. Also, the inmate would have to specify the nature of his problem with the other inmate to establish why he regarded the other inmate as his personal enemy. It was not enough in this context for one inmate merely to state that he was a member of a prison gang; that the other inmate was a member of another prison gang and that the

gangs regard themselves as rivals. It was standard practice for an inmate being disciplined for fighting to be asked at the disciplinary hearing if the other inmate participant was an enemy. If an inmate indicated that the fight was the result of an enemy situation, then those two inmates would be housed so that they would not again go to the yard together. Appendix C at 29.

An inmate could request controlled yard status at any time. This was done by the inmate asking his counselor to schedule him for committee review. An inmate could also ask the SHU Lieutenant to schedule him for committee. The committee would then talk to the inmate about the request and determine if there was a need for controlled yard status. Appendix C at 29.

Respondent did not request controlled yard status until September 1, 1989, when he appeared before the committee reviewing his 90 day credit loss for being the aggressor in a physical altercation on the SHU yard. Respondent received controlled yard status on September 1, 1989, and remained on such status until November 16, 1989. Respondent was transferred to Pelican Bay State Prison on March 12, 1990. Appendix C at 29.

In 1989, during the time that respondent was incarcerated at Corcoran, it was generally known among SHU staff that the Nuestra Familia prison gang was purposefully instigating violence among SHU inmates in an attempt to force Corcoran to abandon the SHU gang

integrated yards and establish SHU gang segregated yards.[2] Appendix C at 29-30.

b. Procedural Background

On June 19, 1989, respondent filed his complaint in this matter claiming that his constitutional rights were violated under the First, Sixth, Eighth and Ninth Amendments by his placement and retention in security housing based on his affiliation with a prison gang, the Mexican Mafia (EME). Respondent named seven defendants including petitioner Aispuro herein.

On June 11, 1991, petitioner and other defendants filed a motion for summary judgment which was opposed by respondent. On August 28, 1991, the assigned magistrate filed findings and recommendations that the motion for summary judgment be granted in favor of all defendants except petitioner Aispuro and one other defendant. Both respondent and petitioner filed objections thereto, and petitioner filed a motion for reconsideration on October 4, 1991. On November 26, 1991, the District Court Judge ordered that the motion for summary judgment be granted with respect to all defendants except Aispuro, and that petitioner Aispuro's motion be granted with respect to all claims except those claims that deal with his policy of an integrated exercise yard; and

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[2] Plaintiff was placed in SHU while at Folsom State Prison based on confidential information that he is an associate of the Mexican Mafia prison gang.

that the order was without prejudice to the right of petitioner Aispuro to present a renewed motion for summary judgment.

On December 13, 1991, petitioner filed his renewed motion for summary judgment specifically addressing issues relating to the integrated yard policy at Corcoran State Prison. On September 10, 1992, the magistrate recommended that petitioner Aispuro's renewed motion for summary judgment be denied. Petitioner filed objections to the recommendation on September 25, 1992, and respondent responded thereto.

On November 5, 1992, the District Court Judge ordered petitioner to file a supplemental memorandum of points and authorities addressing the issue of qualified immunity. Petitioner filed such supplemental memorandum on December 4, 1992. Both respondent and petitioner subsequently filed additional argument. On February 23, 1993, the District Court Judge denied petitioner's renewed motion for summary judgment and denied petitioner qualified immunity.

The District Court identified the right violated as the right to be free from cruel and unusual punishment secured by the Eighth Amendment, and determined that the parameters of such right were clearly established at the time of the institution of the integrated yard policy at Corcoran. The District Court noted that Ninth Circuit cases limited the holding in *Hunter v. Bryant*, 502 U.S. 224 (1991) to cases involving questions of probable cause or reasonable suspicion (generally within the context of the Fourth Amendment), and that the "objective legal reasonableness" test enunciated by the court in *Harlow v.*

Fitzgerald, 457 U.S. 800 (1981) would not generally be applicable within the context of an Eighth Amendment violation (alleging that conditions of confinement amount to cruel and unusual punishment) since the necessary determination of deliberate indifference required inquiry into the subjective intent of a defendant official. The court indicated that such subjective intent inquiry would necessarily be a question for the jury, precluding a grant of qualified immunity at the summary judgment stage. The court concluded that the respondent had met his burden of identifying the specific right allegedly violated and proving that this right was clearly established, but that "defendant has not met his burden of proving that no jury could reasonably conclude that his conduct was anything other than objectively reasonable." Appendix B at 14.

On March 23, 1993, petitioner filed a timely notice of appeal. Petitioner's brief on appeal was filed May 19, 1993. Respondent did not file a brief in this matter. The Ninth Circuit Court of Appeals filed its decision in this matter on July 13, 1994. The Ninth Circuit upheld the lower court determination noting that pursuant to *Act Up/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) a genuine issue of fact can prevent determination of qualified immunity at summary judgment. The Ninth Circuit agreed with the District Court that the right involved was clearly established and noted that a prison official has a constitutional duty to take reasonable measures to ensure a prisoner's safety from assaults by other prisoners. The Ninth Circuit agreed that there was a genuine issue of fact as to whether petitioner acted with deliberate indifference in operating the SHU integrated yards, and that

such factual dispute prevented a qualified immunity determination. The court cited *Wilson v. Seiter*, 501 U.S. 294 (1991) for the proposition that state of mind is a consideration in determining deliberate indifference. Appendix A.

REASONS FOR GRANTING THE WRIT

This case presents an important and unsettled question within the Ninth Circuit concerning the proper standard for resolving a claim of qualified immunity by law enforcement officers within the context of the Eighth Amendment's prohibition against cruel and unusual punishment. The Ninth Circuit erred because it failed to inquire whether the law was clearly established in a particularized way for purposes of determining qualified immunity. Second, even assuming that such a narrow inquiry were not necessary, it failed to determine whether the policies established by petitioner were objectively reasonable in the circumstances of the case, and thus entitled petitioner to qualified immunity on that basis. Finally, the court erred in determining that in the context of an alleged Eighth Amendment violation, an inquiry must be made into an official's state of mind to evaluate whether the official's actions have been deliberately indifferent, and that this generally factual inquiry negates the possibility of determining qualified immunity at the summary judgment stage, eliminating the availability of such defense within the Eighth Amendment context. In light of the above errors, the petition for writ of certiorari should be granted.

I

PETITIONER DEMONSTRATED THAT QUALIFIED IMMUNITY APPLIED TO HIM BECAUSE THE LAW ALLEGEDLY VIOLATED WAS NOT CLEARLY ESTABLISHED AND PETITIONER ACTED IN AN OBJECTIVELY REASONABLE MANNER

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1981) the court reasoned that if the law was not clearly established at the time of the action in question, immunity applies because an official could not reasonably be expected to "know" that the law forbade conduct not yet identified as unlawful. If, on the other hand, it is determined that the law was clearly established, whether an official is protected by qualified immunity generally turns on the "objective legal reasonableness" of the action. *Harlow* at 819.

a. The Law Must Be Defined With Particularity When Determining If It Was Clearly Established For Purposes of a Qualified Immunity Defense

A determination of whether the law was "clearly established" requires that the right allegedly violated be identified with particularity. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the court reasoned that the level of generality at which the relevant "legal Rule" is identified impacts the usefulness of the standard.

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right.

> Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson v. Creighton, 483 U.S. 635, 639-640 (1987).

The court discussed that to state the standard too broadly makes it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages, and thus the right must be clearly established in a more particularized and more relevant sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. In other words, in the light of pre-existing law the unlawfulness must be apparent. The court has reaffirmed this position in *Hunter v. Bryant*, 502 U.S. 224, 226 (1991). See also *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they took); *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

In the present case, petitioner Aispuro established and implemented a policy of integrated gang yards for the Security Housing Units at Corcoran State Prison. The concept of gang integrated yards at Corcoran was initiated when the Corcoran SHU facility was in the planning

stages. The Department of Corrections monitored statewide prison gang activity and was acutely aware of serious gang related problems at various institutions throughout the state. The concept of gang integrated SHU yards was viewed as one way to combat the increasing institutional gang violence. Appendix C at 34. The action about which respondent complains is that he was identified as a member of the Mexican Mafia and then was assigned to an exercise yard at Corcoran which also had assigned to it members of gangs which were rivals of the Mexican Mafia. Under the guidelines established by this court in *Anderson v. Creighton,* the particularized question in this case is whether petitioner violated clearly established law when he implemented a policy that inmates would not be segregated for exercise according to prison gang affiliation.

Respondent's challenge is specific to the issue of being assigned to an exercise yard where he might encounter an inmate belonging to a rival gang. He is claiming that gang integrated yards are inherently dangerous and thus violated his personal safety regardless of the procedural protections in place. However, given the extensive design and procedural protections in place at Corcoran and the institutional long range goal to diminish the power of prison gangs, the question of whether the law was clearly established must focus in some way on the particular right to be offered yard exercise only with certain inmates.

The District Court identified the right involved as the right to be free from cruel and unusual punishment secured by the Eighth Amendment. The Ninth Circuit narrowed such right by defining it as the right to be safe

from assaults by other prisoners. However, such a broad statement of the right in question frames it in a way to establish a rule of virtually unqualified liability denounced in *Anderson v. Creighton*. If the Ninth Circuit had framed the question of clearly established law in a particularized way, as required by this court, then it would have reached the determination that the law was not clearly established that inmates must be segregated for exercise according to prison gang affiliation, and petitioner Aispuro would be therefor entitled to qualified immunity.[3]

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[3] While petitioner is unable to find law relevant to configuration or staffing of exercise yards, we note that *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1415 (E.D. Cal. 1984), affd. in part, revd. in part on other grds., 801 F.2d 1080, *cert. denied* 107 S.Ct. 2462, subsequent order following remand, 711 F.Supp. 536, affd. in part, revd. in part on other grds., vac. in part on other grds., 926 F.2d 800, *cert. denied* 112 S.Ct. 213, held that high levels of violence alone do not establish a constitutional violation. *Toussaint* requires a showing that in the face of such violence, prison officials failed to undertake reasonable steps to protect inmates. The court noted that a violation would result from failure to provide adequate guards; failure to make any attempts to separate hardened, violent inmates from younger, vulnerable ones; or the use of physical facilities that do not enable authorities to detect or prevent violence.

In the present case, each exercise yard had constant surveillance, continuous gun coverage, and all activity was videorecorded for simultaneous display in the control room; the yards consisted solely of inmates assigned to the Security Housing Unit; and the physical facilities were modern and specifically designed to accommodate the security risks posed by SHU inmates.

In *Alberti v. Klevenhagen*, 790 F.2d 1220 (5th Cir. 1986), *reh. den.* 799 F.2d 992, the court addressed staffing levels and frequency of observation of inmates at a county jail facility. The

b. An Official Is Entitled To Qualified Immunity Where His Conduct Is Objectively Reasonable

However, given that the Ninth Circuit erred in framing its inquiry too broadly, resulting in a determination that the law *was* clearly established, the court was then required to consider whether the action of petitioner was "objectively reasonable." If petitioner's action was objectively reasonable, qualified immunity applies. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981). In the present case, if a reasonable warden could have believed that establishing integrated SHU yards, with the design and procedural safeguards present at Corcoran, would lead to greater security and safety for all inmates and staff, then qualified immunity applies.

It is undisputed in the record that correctional officials were aware that prison gangs use the yards for such gang activities as the maintenance of internal discipline and cohesiveness; the recruitment of new members; the training in particular gang activities such as modes of assault, modes of smuggling, weapons manufacturing, and modes of passing messages; "schooling" in gang lore and discipline; passing the word with respect to past and future gang activities, the status of members and leaders of the gang, and other organizational information; and the planning of particular gang criminal activities. Appendix C at 34-35. These activities are made much

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plan approved by the court required two guards in each quadrant on each floor, and required guards to visit inmate cells at least once per hour. We note that the SHU exercise yards at Corcoran provided far greater security.

more difficult by implementation of a policy of mixing yards and scattering gang members.

The SHU integrated yards also provided an opportunity for SHU inmates to show they would be able to function in an integrated general population setting if released from SHU. For inmates who claimed to be gang drop outs, the integrated yards provided an opportunity for the inmate to show he could get along in a gang integrated setting and for staff to observe the inmate's functioning in an integrated setting and whether the inmate's activity exhibited gang affiliation or substantiated the claimed defection. Appendix C at 35.

Petitioner Aispuro instituted the policy in an attempt to control gang activity, and to deter the recruitment and consolidation of gang power by limiting the opportunity for meeting, planning, training, and exhibiting displays of strength or influence.[4] The yards were small and extremely secure, with inmates strip searched and examined with a metal detector before entry, and with constant gun and video camera surveillance. Appendix C at 35-36.

The integrated yard policy was carefully planned with numerous design and procedural protections to provide for the safety of inmates on the yard. In addition, it was a carefully considered way to increase the overall safety for non-gang affiliated SHU inmates and general

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[4] All the information herein discussed was presented to the courts below by way of declaration under penalty of perjury, to establish evidence upon which summary judgment could be granted.

population inmates, as well as staff, by eroding the cohesiveness and power of the various prison gangs which were becoming continually more powerful throughout the statewide prison system.

Petitioner Aispuro as the warden established the policies for operation of the SHU integrated gang yards. There is no dispute of fact as to what the policies were. The Ninth Circuit notes that respondent has submitted evidence[5] regarding the placement of known enemies together on the yard, and concludes that such placement raises an Eighth Amendment issue (i.e. whether petitioner's actions constituted deliberate indifference). However, petitioner cannot be liable for the actions of officers who allegedly failed to follow the established policy.[6]

Consequently, the question for the court is whether the policy was objectively reasonable or was the policy such that petitioner must have known his conduct was unlawful at the time he implemented the policy. Could a

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[5] The Ninth Circuit notes that there were 796 "reportable incidents" in Corcoran's SHU facility within an eighteen month period, however, as explained in the record below this information relates to all types of "reportable incidents," not just assault incidents, and encompasses the whole of the SHU unit and not just the exercise yards. The record also establishes that during 1989 the daily average SHU population at Corcoran was 1,134.

[6] We also note that plaintiff has not presented admissible evidence on this matter and has not presented any evidence to establish that the altercations in which he was involved were gang related, and therefore that the integrated yard policy was relevant to such altercations. Neither does plaintiff claim that the altercations in which he was involved were with his known enemies.

reasonable warden have believed that establishing integrated SHU yards would lead to greater security and safety for all inmates and staff? Could a reasonable warden have thought he was acting in accordance with the constitutional provision against cruel and unusual punishment in enacting such policy? The doctrine of qualified immunity provides "ample room for mistaken judgments" because it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343 (1986); quoted in *Hunter v. Bryant*, 502 U.S. 224 (1991). Petitioner believes that the Ninth Circuit erred in failing to determine the objective legal reasonableness of petitioner's conduct.

II

THE DOCTRINE OF QUALIFIED IMMUNITY REQUIRES THAT A COURT DETERMINE THE OBJECTIVE LEGAL REASONABLENESS OF AN OFFICIAL'S ACTION WHEN A PRISONER CHALLENGES CONDITIONS OF CONFINEMENT

The District Court decision in this case limits the application of *Hunter v. Bryant*, 502 U.S. 224 (1991), to qualified immunity inquiries within the context of the Fourth Amendment. The District Court noted that Ninth Circuit cases interpreting and applying *Hunter* have concluded that the case only addresses qualified immunity determinations when the question of probable cause (or reasonable suspicion) is at issue, as in the context of the Fourth Amendment. The District Court cites *Act Up/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993) (interpreting *Hunter* as applicable only in the context of a Fourth Amendment determination of the existence of probable

cause (or reasonable suspicion)); *Cooper v. Dupnik*, 963 F.2d 1220, 1223 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 407 (1992); *Exxon Shipping v. Pacific Resources, Inc.*, 789 F.Supp. 1521 (D. Hawaii 1991); *Sinaloa Lake Owners Ass'n, Inc. v. Stephenson*, 805 F.Supp. 824, 827-828 (C.D. Cal. 1992). Appendix B at 11.

The court goes on to say that in the context of the Eighth Amendment[7] an inquiry into the reasonableness of an official's conduct will almost always necessitate a factual inquiry requiring a jury determination. The District Court discusses at some length that this is so because a determination whether the official acted with deliberate indifference (the test established by *Wilson v. Seiter*, 501 U.S. 294 (1991)) requires inquiry into the official's state of mind. The Ninth Circuit seems to agree with this position in stating that a genuine issue of fact prevents a determination of qualified immunity at the summary judgment stage, and citing *Wilson v. Seiter* for the proposition that a defendant's state of mind must indicate deliberate indifference to a prisoner's needs.

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[7] Petitioner notes that the vast majority of prisoner civil rights cases concern conditions of confinement and thus involve an alleged violation of the Eighth Amendment. The effect of excluding the availability of qualified immunity in the context of the Eighth Amendment means that as a general rule prison officials would be subject to the burdens of litigation that the doctrine is meant to avoid. In light of the frequency with which prison officials, especially those holding high administrative positions, are sued by inmates housed in the institutions to which such officials are assigned, this court is asked to carefully consider the impact of such exclusion.

The lower court decisions herein seem to insist that within an Eighth Amendment context disputed facts will invariably arise and prevent resolution of qualified immunity prior to trial. The court's reasoning is that once a prima facie case for deliberate indifference is pled, such allegations of fact present the ultimate issue for determination. The court assumes deliberate indifference (based on respondent's factual allegations), making it impossible to ever decide at the summary judgment stage that the official has acted in an objectively reasonable manner since deliberate indifference can never be "reasonable." Consequently, in an Eighth Amendment context where the standard for establishing liability is deliberate indifference, actions can never be found to be reasonable as a matter of law at the summary judgment stage, and an official can never be entitled to the benefit of qualified immunity. The court bolsters this position by noting that deliberate indifference necessitates inquiry into the official's state of mind (the subjective element of a liability determination), a question which must be resolved by the trier of fact.

The Supreme Court has recently made it abundantly clear that government officials performing discretionary functions are to be given qualified immunity except where they knowingly violate the law. In *Elder v. Holloway*, ___ U.S. ___, 114 S.Ct. 1019, 1021 (1994), requiring an appellate court reviewing qualified immunity to consider all relevant precedents, not simply those cited to or discovered by the district court, the court made it clear that technicality will not be utilized to limit the reach of qualified immunity. *Elder* reiterated that qualified immunity's central objective is to protect public officials from

undue interference with their duties and from potentially disabling threats of liability. The Supreme Court seems to be instructing the circuits that this doctrine is to be utilized to the fullest extent, not selectively. Nowhere has this court limited the use of qualified immunity to cases only involving questions of probable cause or reasonable suspicion (although it frequently arises in this context), and there is no basis for the Ninth Circuit to so interpret the clear instruction of this court in *Hunter v. Bryant*, 502 U.S. 224 (1991). The reluctance of the Ninth Circuit to apply qualified immunity in the present case would seem to contradict the import of the court's position in *Elder* that the doctrine is not to be restricted. Instead, in its application, reviewing courts are to use all available resources.

In *Farmer v. Brennan*, ___ U.S. ___, 114 S.Ct. 1970 (1994),[8] the court held that a prison official can be found liable under the Eighth Amendment for denying humane conditions of confinement only if he knows of and disregards an excessive risk of harm. The court emphasized that an official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. Thus, it is reiterated that there is a subjective requirement to the determination of deliberate indifference. However, *Farmer v. Brennan* at p. 1983 also instructs that "[w]hether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."

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[8] This case was decided June 6, 1994, prior to issuance of the Ninth Circuit decision on July 13, 1994.

However, a question remains regarding the relationship between a determination of deliberate indifference and qualified immunity. In *Farmer v. Brennan* and its predecessors the Supreme Court has lessened the burden on government officials who are alleged to have violated Eighth Amendment rights (by exhibiting deliberate indifference to serious needs or safety), in the course of their official actions. Under the standard articulated in *Farmer*, a greater degree of culpability is required for a finding of deliberate indifference than for the "objective reasonableness" of qualified immunity. Thus if the questions are not separated in some way, *Farmer* would seem to alter the standard for qualified immunity within the Eighth Amendment context from one of objective reasonableness to subjective recklessness. In many cases this specific inquiry into mental state and actual knowledge might raise disputed issues of fact precluding a grant of qualified immunity by the court at an early stage in the proceedings. It seems odd to enunciate a standard which offers an official greater protection (i.e. that the official actually draw the inference that a substantial risk of harm exists) but generally requires a determination by the trier of fact, if that standard is meant to be applied in deciding qualified immunity, since the court has instructed that such immunity is an immunity from suit and should be available to an official at the earliest possible stage in litigation. *Hunter v. Bryant*, 502 U.S. 224 (1991).

Petitioner believes that the District Court and the Ninth Circuit misapply the law and confuse two separate questions. When applying qualified immunity, the first

inquiry is whether there is clearly established law governing the behavior in question. If there is clearly established law which sanctions the behavior, or if the behavior is objectively reasonable within the context of clearly established law, qualified immunity is established and the case goes no further. Such behavior is placed within the context of the most specific, relevant law governing the behavior. If the law is not specific enough to sanction the behavior, or if the behavior cannot be found as a matter of law to be "reasonable" given the particular circumstances of the case, the matter goes to trial.[9] At trial *Farmer v. Brennan* directs a subjective evaluation of the official's state of mind. Unless the defendant has acted with subjective recklessness, he need not answer for the action, even though the clearly established relevant law is not specific enough to cover every aspect of the challenged behavior.

Thus, only if it is first determined that an official is *not* entitled to qualified immunity, does the court proceed to determine if the official is nonetheless entitled to judgment because plaintiff has failed to prove deliberate indifference. In the Eighth Amendment context, the court would determine (1) if the alleged deprivation was sufficiently serious and (2) if a defendant had the requisite culpable state of mind to establish liability. An official's

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[9] Within the context of a given case, a determination that qualified immunity does not apply, may still allow for a determination of liability at the summary judgment stage. This would be true in a case where there is no dispute as to the underlying facts, but the parties disagree as to whether in light of such facts, the official's action constituted deliberate indifference.

state of mind is not at issue where the question is limited to qualified immunity. Instead, if it is determined that the law was clearly established at the time of the action in question, then the conduct of the official is evaluated in terms of *objective* reasonableness. If such conduct is objectively reasonable, qualified immunity applies. This approach would comport with the instruction in *Farmer v. Brennan*, ___ U.S. ___, 114 S.Ct. 1970, 1983 (1994) that prison officials who act reasonably cannot be found liable.

CONCLUSION

For all of the above state reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY MELENDEZ LONGORIA, Plaintiff-Appellee, v. ROBERT G. BORG, Warden, et al., Defendants, and BERNIE AISPURO, Warden, Defendant-Appellant.	No. 93-15573 D.C. No. CV-89-00854-WBS MEMORANDUM* (Filed July 13, 1994)

Appeal from the United States District Court for the Eastern District of California William B. Shubb, District Judge, Presiding
Submitted May 13, 1994**
San Francisco, California

Before: GOODWIN, POOLE, REINHARDT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a); Ninth Circuit rule 34-4.

Bernie Aispuro, the former warden of the California State Prison at Corcoran ("Corcoran"), appeals the denial of his motion for summary judgment based on qualified immunity in a 42 U.S.C. § 1983 action brought by inmate Tony Melendez Longoria. Longoria contends that the operation of the integrated exercise yards at Corcoran constituted cruel and unusual punishment. We have jurisdiction pursuant to the collateral order doctrine, *Mitchell v. Forysth*, 472 U.S. 511, 530 (1985), and we affirm.

We review de novo the district court's denial of a motion for qualified immunity. *Lum v. Jensen*, 876 F.2d 1385, 1386 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990). Qualified immunity protects government officials who perform discretionary functions from civil damages liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

To determine whether an official is entitled to qualified immunity, a court must determine (1) whether the right allegedly violated was "clearly established" at the time of the alleged violation, and (2) whether, in light of that law, a reasonable official could have believed his conduct to be lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Ordinarily, the district court should resolve the question of qualified immunity before trial, *Hunter v. Bryant*, 112 S. Ct. 534, 536-37 (1991), but if "a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial." *Act Up!/Portland*, 988 F.2d at 873.

To prevail in a claim alleging a violation of the Eighth Amendment based on conditions of confinement, a plaintiff must establish two elements: First, plaintiff must show that the alleged deprivation was sufficiently serious. *Wilson v. Seiter*, 501 U.S. 294 (1991). Second, plaintiff must be able to show that the defendant had the requisite state of mind: that he or she acted with "deliberate indifference" to prisoner needs. *Id.*

The district court concluded that the right involved was sufficiently clearly established to withstand the defendant's motion for summary judgment. We agree. A prison official has a constitutional duty to take reasonable measures to ensure a prisoner's safety from assaults by other prisoners. *See Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Walsh v. Mellas*, 837 F.2d 789 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988); *Martin v. White*, 742 F.2d 469 (8th Cir. 1984).

The district court also found that Longoria had met his burden of establishing that a genuine issue of fact existed regarding whether the defendants acted with deliberate indifference in operating the SHU integrated yards, despite evidence of repeated assaults and even deaths. It held that the existence of such factual disputes prevented a determination of qualified immunity at the summary judgment stage. We agree.

According to interrogatory responses provided by defendant Aispuro, between January 1, 1989 and June 30, 1990, there were a total of 796 "reportable incidents" in

Corcoran's SHU facility and four inmates lost their lives.[1] Although prison officials set up various policies to avoid assaults at Corcoran's SHU yards, the plaintiff has submitted evidence to indicate that these procedures were not followed. While Aispuro contends that known enemies were not placed in the same yard together, the plaintiff has introduced affidavits and disciplinary logs that contradict that assertion. *See* Pl.'s Opp. Summ. J. Exh. E, F & G. Given that the inmates housed in Corcoran SHU were "Level IV" inmates, segregated from the general prison population because of a history of violence or gang involvement, failing to separate known enemies from each other under such circumstances raises an Eighth Amendment issue.

What conduct underlies the violation – what Aispuro did or failed to do – is a determination of fact. *See Act Up!/Portland*, 988 F.2d at 873. The court correctly found that disputed issues of fact prevented a determination of qualified immunity at summary judgment.

AFFIRMED.

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[1] Defendant Aispuro contends that the reason for the higher than average number of assaults at Corcoran's SHU yards was due in part to the fact that the Nuestra Familia prison gang was allegedly instigating fights in order to compel prison administrators to change its policy, and institute gang segregated yards. Even if this is true, however, a question of fact remains as to whether Aispuro, in the face of four deaths on the SHU yards, should have taken other measures to protect inmates from violence.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TONY MELENDEZ LONGORIA,
Plaintiff,
v.
ROBERT G. BORG, et al.,
Defendants.

NO. CIV. S-89-0854-WBS

MEMORANDUM AND ORDER

(Filed Feb. 23, 1993)

Plaintiff Tony Melendez Longoria (hereinafter "plaintiff"), a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On September 10, 1992, the Magistrate Judge filed findings and recommendations denying a renewed motion for summary judgment brought by defendant B. Aispuro, a prison official (hereinafter "defendant"), on plaintiff's claim that placement of plaintiff in the exercise yard in accordance with Corcoran State Prison Security Housing Unit's (hereinafter "Corcoran SHU") integrated yard policy[1] violated the Eighth Amendment's prohibition of cruel and unusual punishment. On September 25, 1992, defendant filed timely objections. By Order filed

[1] The effect of this policy is that prison inmates are *not* separated for yard exercise based upon gang affiliation.

November 5, 1992, this court ordered defendant to file a supplemental memorandum of points and authorities, with any appropriate declarations, on the question of qualified immunity.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, the court reviews this matter *de novo*.[2] Drawing all reasonable inferences in plaintiff's favor, as required, this court finds for the reasons explicated in the Magistrate Judge's findings and recommendations that defendant's motion for summary judgment must be denied because plaintiff has presented sufficient evidence on his Eighth Amendment claim to withstand the motion. The court nonetheless finds it appropriate to address the issue of qualified immunity because it was not considered by the Magistrate Judge.

FACTUAL BACKGROUND[3]

Plaintiff was transferred to Corcoran SHU on February 11, 1989.[4] Inmates at Corcoran SHU are released to

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[2] When hearing a summary judgment motion against a prisoner, the court is required "as a bare minimum [to provide] him or her with fair notice of the requirements of the summary judgment rule." *Klingele v. Eikenberry*, 849 F.2d 409, 411 (9th Cir. 1988). Notice is not necessary in this case because plaintiff has filed a well-briefed opposition.

[3] The facts presented here are taken from the parties' respective versions of undisputed facts. For the purposes of this motion, the court has accepted as true any facts not explicitly or implicitly disputed by the adverse party.

[4] The Corcoran SHU was opened in December, 1988. This facility has small pie-shaped exercise yards, each approximately 1577 square feet in area surrounded by a high cement wall capped by barbed tape.

the exercise yard according to their sections in groups of up to twenty inmates. Consistent with the cell assignments, the yard groups include a mixture of inmates of different racial or ethnic backgrounds, including members or affiliates of various gangs, and inmates who are not gang-affiliated. Defendant has previously admitted that he is responsible for the institution of the integrated yard policy. When the yards are occupied, gun officers survey them from a control room immediately above the entrance to the yards. Armed with a rifle, tear gas grenades and shells which discharge non-lethal wooden baton blocks via a 38mm gun[5], the gun officer is prepared to take appropriate action to immediately halt any outbreak.

Between the dates of February 16, 1989 and July 30, 1989, plaintiff was involved in five altercations on the Corcoran SHU yard.[6] In four of the five altercations, plaintiff was determined to be the victim. Medical records from the February 16, 1989 assault indicate that plaintiff suffered a cut to the side of his nose, mild swelling of his right cheek, scratches on his left arm, a superficial abrasion on his left hand and the loss of a crown on his tooth. Medical treatment for these injuries consisted of cleansing of the injured areas and the application of cool compresses. The medical records also reveal that no obvious

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[5] The gun officer employs the wooden blocks to stop fights in the yard by firing the 38mm gun at the yard floor or wall, discharging the wooden blocks so they ricochet into the fighting inmates and immobilize them.

[6] The exact dates of each of these altercations are: February 16, 1989; March 21, 1989; June 12, 1989; July 17, 1989; and July 30, 1989.

injuries were inflicted in any of the other altercations. On September 1, 1989, plaintiff requested and was granted controlled yard status, whereby plaintiff was allowed to exercise alone in the yard. Plaintiff remained on controlled yard status until November 16, 1989 and was transferred to Pelican Bay Prison on March 12, 1990.

SUMMARY JUDGMENT IN THE CONTEXT OF QUALIFIED IMMUNITY AND THE EIGHTH AMENDMENT

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464, 467 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir. 1984).

In attempting to establish the existence of this factual dispute, the opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 477 U.S. at 248; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987). The opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing

versions of the truth at trial." *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968); *T.W. Elec. Serv.*, 809 F.2d at 631.

In resolving the summary judgment motion, the evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 252, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. 572, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir. 1979).

The same standards for summary judgment apply when considering summary judgment where the defense of qualified immunity is presented. However, where a motion for summary judgment raises the issue of qualified immunity, the standards must be applied in light of special considerations.

Qualified immunity, unlike most other defenses, is intended to be " 'immunity from suit rather than a mere defense to liability.' " *Hunter v. Bryant*, 112 S.Ct 534, 536 (1991) (per curiam) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). This difference begs for the resolution of the qualified immunity issue at the earliest stage possible. *See Id.* at 537. However, resolution of the applicability of qualified immunity pre-trial is more appropriate in some cases than in others.

The determination of whether a defendant is entitled to the defense of qualified immunity presents three queries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable

officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable official could have believed lawful the particular conduct at issue. *DeNieva v. Reyes*, 966 F.2d 480, 486 (9th Cir. 1992); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991); *Hamilton v. Endell*, No. 91-35651, 1992 U.S. App. LEXIS 32487, at * ___ (9th Cir. Dec. 15, 1992).

The plaintiff bears the burden of proving that the right allegedly violated was clearly established at the time of the alleged misconduct. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir. 1989) (citing *Davis v. Scherer*, 468 U.S. 183, 197 (1984)). If the plaintiff carries this burden, then the government official bears the burden of proving that his or her conduct was reasonable even though it might have violated constitutional standards. *Benigni v. City of Hemut*, 879 F.2d 473, 479-80 (9th Cir. 1988).

Cases hinging on one or both of the first two inquiries in the qualified immunity determination – identifying a specific right and determining whether that right was so clearly established – are generally agreed to be appropriately resolved by summary judgment because they involve purely issues of law. However, courts have debated whether summary judgment is appropriate in cases in which the qualified immunity analysis turns upon the resolution of the third inquiry because the [sic] that inquiry may be factual in nature depending on the underlying claim.

The Supreme Court has addressed the question of the appropriateness of the resolution of the issue of qualified immunity at summary judgment in the context of the

Fourth Amendment. *Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534 (1991). Identifying the question of whether a reasonable officer could have believed he or she had probable cause as one of law, the Court has announced that the qualified immunity determination should not routinely be placed in the hands of the jury. *Id.* at 536-37.

Although *Hunter* did not explicitly limit its holding to qualified immunity inquiries in the Fourth Amendment context, Ninth Circuit cases interpreting and applying *Hunter* have concluded that the case only addresses qualified immunity determinations when the question of probable cause (or reasonable suspicion) is at issue, as in the context of the Fourth Amendment. *See Act Up/Portland v. Bagley*, 93 Daily Journal D.A.R. 1921, 1924 (9th Cir. 1993) (interpreting *Hunter* as applicable only in the context of a Fourth Amendment determination of the existence of probable cause (or reasonable suspicion)); *Cooper v. Dupnik*, 963 F.2d 1220, 1223 (9th Cir. 1992); *Exxon Shipping v. Pacific Resources, Inc.*, 789 F.Supp. 1512, 1520 (D. Hawaii 1991); *Sinaloa Lake Owners Ass'n, Inc. v. Stephenson*, 805 F.Supp. 824, 827-28 (C.D. Cal. 1992).

The Ninth Circuit in *Bagley* explained why, in the Fourth Amendment context, a genuine issue of fact precluding summary judgment is less likely:

> If a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial. Where a Fourth Amendment violation is claimed, the factual issues that may preclude a determination of qualified immunity on summary judgment fall into two categories. First, a

> determination of reasonable suspicion or probable cause. . . . Second, the determination of what conduct underlies the alleged violation. . . . [T]he determination whether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court. . . . [and] not in itself a factual issue that can preclude summary judgment.

Bagley, 93 Daily Journal at 1924 (citations omitted).

In the context of the Eighth Amendment, however, determination of the third query – whether a reasonable official under the same circumstances would have acted similarly, therefore rendering defendant's actions reasonable – will almost always necessitate a factual inquiry. The Supreme Court has cautioned against a subjective analysis of the mental state of the official in reaching the conclusion of whether a reasonable official could have believed lawful the conduct at issue. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *Anderson v. Creighton*, 483 U.S. at 641. However, the defendant is entitled to prove his or her objective reasonableness by introducing evidence that he or she acted without the subjective intent necessary to establish an Eighth Amendment violation, i.e., without deliberate indifference, as it is relevant to the determination of objective reasonableness.

Furthermore evidence regarding the subjective intent of the official must also be introduced by the plaintiff to meet his or her burden of showing deliberate indifference to establish an Eighth Amendment violation. *See* discussion, *infra* p. 10. This evidence of deliberate indifference on the part of the official involved is relevant in resolving

whether a reasonable official under the same circumstances would not have acted similarly.

A court addressing the issue of qualified immunity in the Eighth Amendment context may have already found that plaintiff met his or her burden of showing that material issues of fact exist as to defendant's deliberate indifference. In such a situation, that court is faced with determining whether there is a material issue of disputed fact regarding the reasonableness of the official's conduct having already concluded that there is a material issue of disputed fact with respect to deliberate indifference. Consequently, that court cannot resolve the third inquiry at summary judgment unless despite plaintiff's showing of deliberate indifference by the defendant, the only conclusion that a reasonable jury could reach is that a reasonable official could have believed lawful the particular conduct at issue.

DISCUSSION

The Eighth Amendment prohibition of cruel and unusual punishment protects one's right to be free from "the unnecessary and wanton infliction of pain." *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). To prevail, a plaintiff must establish two elements: First, plaintiff must show that the alleged deprivation was sufficiently serious. *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321, 2324 (1991). Second, plaintiff must be able to show that the defendant had the requisite culpable state of mind to establish liability. *Id.* at 2326.

Even if defendant's conduct were found to constitute a violation of the Eighth Amendment, defendant may be

entitled to summary judgment based upon the defense of qualified immunity. The Ninth Circuit has held that, "regardless of whether the constitutional violation occurred, the . . . [government official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the . . . [government ofiicial] could have reasonably believed that his particular conduct was lawful." *DeNieva v. Reyes*, 966 F.2d 480, 486; *accord Romero v. Kitsap County*, 931 F.2d 624, 627.

As previously articulated, the determination of whether the defense of qualified immunity is appropriate presents three queries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable official to its constitutional parameters; and (3) the ultimate determination of whether a reasonable official could have believed lawful the particular conduct at issue. *DeNieva*, 966 F.2d at 486; *Romero*, 931 F.2d at 627; *Hamilton v. Endell*, 1992 U.S. App. LEXIS 32487, at * ___.

For the following reasons, the court concludes that defendant is not entitled to summary judgment on the defense of qualified immunity because plaintiff has met his burden of identifying the specific right alleged!y violated and proving that this right was clearly established, and defendant has not met his burden of proving that no jury could reasonably conclude that his conduct was anything other than objectively reasonable.

1. Identification of the Constitutional Right Violated

Plaintiff identifies as his clearly established right, the right to be free from cruel and unusual punishment secured by the Eighth Amendment. This right was allegedly violated by defendant's institution and maintenance of an integrated yard policy, according to which plaintiff was placed in the yard and subsequently involved in five altercations with other inmates in the yard.

2. Clear Establishment of the Contours of the Right

In determining whether the right asserted is clearly established, the court must look to the state of the law at the time the alleged conduct took place. *Harlow v. Fitzgerald,* 457 U.S. at 818. The result of this inquiry depends quite significantly on the level of generality employed in defining the right. *Anderson,* 483 U.S. at 638. The Supreme Court has cautioned against a broad definition of the right involved which would allow plaintiffs to "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 639 (indicating that a definition of the right allegedly violated as "the right to due process" is too broad as it encompasses any action that violates it). The Supreme Court has instructed courts that the right must be clearly established in a particularized sense:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

> This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citations omitted] but it is to say that in light of preexisting law the unlawfulness must be apparent.

Anderson, 483 U.S. at 641.

In the case at bar, a review of the case law reveals that the parameters of the Eighth Amendment were sufficiently clearly established at the time of the alleged violation to extend to defendant's alleged actions.[7] "Prison officials know, or reasonably should know, that unjustified beating of an inmate, or reckless indifference to an inmate's safety" is unconstitutional. *Brooks v. Singletary*, 1990 U.S. Dist. LEXIS 14438 (N.D. Ill. 1990) (citing *Slaken v. Porter*, 737 F.2d 368 (4th Cir. 1984), *cert. denied* sub. nom. *Reed v. Slakan*, 470 U.S. 1035 (1985). In addition to establishing the more general rule that the Eighth Amendment prohibits indifference to a prisoner's safety, case law has more narrowly held that a prison official has a constitutional duty to take measures to ensure a prisoner's safety from assaults by other prisoners. "[P]rison officials have a constitutional duty to take measures to protect against inmate-on-inmate attacks." *Walsh v. Mellas*, 837 F.2d 789, 801 (7th Cir. 1988) (citing *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974)). The "[f]ailure to respond to the known danger of assault upon a member of an identifiable group

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[7] Clearly established law is determined first by looking at binding authority, and if that authority is lacking, by reviewing authority from non-binding jurisdictions. *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1988); *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985).

of prisoners that are targeted by gangs . . . reaches the Eighth Amendment standard of liability." *Walsh v. Mellas*, 837 F.2d at 796.

This court recognizes that a court has not held that the exact conduct of the defendant, in instituting the yard policy and placing plaintiff in the yard despite the altercations in the yard, falls within the ambit of the Eighth Amendment. However, requiring this degree of specificity in defining the right allegedly violated by defendant is applying the rule too narrowly. In *Walsh*, the prison practice at issue was the lack of proper procedure for screening the files of prisoners to determine their involvement with gangs before they are assigned a cellmate. *Id.* at 800. Concluding that this right falls within the ambit of the Eighth Amendment, the court concluded "[a]lthough the precise prison practice before us . . . has never been held unlawful, a precisely analogous case holding this practice unlawful is not what is required to pierce an officer's immunity." *Id.* at 800. Appropriately narrowing the right allegedly violated and analyzing the state of the law at the time of the conduct at issue, this court concludes the right involved here was sufficiently clearly established to withstand defendant's motion for summary judgment.

3. Reasonable Belief in the Legality of the Conduct

The final query in the qualified immunity analysis is whether a reasonable official in the defendant's position would have known that his or her conduct violated clearly established law. As discussed above, although this query concerns primarily objective reasonableness, the

defendant's actual motive in taking the actions at issue is relevant to a determination of reasonableness.

Affirming the Magistrate Judge's findings and recommendations, this court has determined, *supra*, that the Magistrate Judge properly relied upon evidence indicating that numerous altercations occurred in the yard in concluding that plaintiff has made the requisite showing of deliberate indifference to overcome a summary judgment attack.[8] Since the court has found that plaintiff has met his burden of establishing that there is a genuine issue of fact regarding whether defendant was deliberately indifferent, the court is presented with conflicting evidence on the question of whether a reasonable official would have known his conduct violated clearly established law. Presented with this material issue of disputed fact, the court cannot say that no reasonable jury could conclude other than that defendant's conduct was reasonable. Although defendant may ultimately prove to be entitled to the defense of qualified immunity, this determination must be made at trial after a factual record is clearly established.

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[8] Although no direct evidence of deliberate indifference was presented, the Magistrate Judge concluded, and this court affirms, that evidence of altercations in light of the degree of risk that any prisoners involved would be shot to stop the outbreak was sufficient to require a trial to determine whether: 1) defendant should have re-analyzed the yard policy or taken other measures to secure plaintiff's safety, and 2) whether a failure to do this in light of other constraints facing the defendant amounted to deliberate indifference.

IT IS THEREFORE ORDERED that the Magistrate Judge's findings and recommendations are adopted in full;

IT IS FURTHER ORDERED that defendant's renewed motion for summary judgment be, and the same is, hereby DENIED.

DATED: February 22, 1993

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY MELENDEZ LONGORIA, Plaintiff/Appellee, v. ROBERT G. BORG, Warden, et al., Defendant, and BERNIE AISPURO, Warden, Defendant/Appellant.	)	No. 93-15573 DC CV-89-0854 WBS

On Appeal from the United States District Court
for the Eastern District of California
No. CIV S-89-0854 WBS-GGH

Hon. William S. Shubb, District Judge

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TABLE OF CONTENTS

	Page
APPELLANT'S BRIEF ON APPEAL	1
STATEMENT OF JURISDICTION	1
A. District Court Subject Matter Jurisdiction	1
B. Finality of Judgment	1
C. Appellate Jurisdiction	2
ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
A. Procedural History	2
STATEMENT OF FACTS	4
STANDARD OF REVIEW	8
ARGUMENT	8
I DEFENDANT AISPURO IS ENTITLED TO QUALIFIED IMMUNITY SINCE THE LAW ALLEGEDLY VIOLATED WAS NOT CLEARLY ESTABLISHED	8
II THE POLICY ESTABLISHING INTEGRATED YARDS WAS A REASONABLE POLICY DESIGNED TO DECREASE GANG POWER	12
CONCLUSION	17
STATEMENT OF RELATED CASES	18

TABLE OF AUTHORITIES

Cases — Page

Act Up!/Portland v. Bagley, 1993 U.S. App. LEXIS 2019 93 Daily Journal D.A.R. 1921 (9th Cir. 1993) 9

Anderson v. Creighton, 483 U.S. 635 (1987).....10, 11

Baker v. Racansky, 887 F.2d 183 (9th Cir. 1989)..... 8

Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991)..... 11

Elder v. Holloway, 975 F.2d 1388 (9th Cir. 1992)..... 9

Harlow v. Fitzgerald, 457 U.S. 800 (1981).....8, 11

Hemphill v. Kincheloe, 987 F.2d 589 (9th Cir. 1993) 10

Hunter v. Bryant, 112 S.Ct. 534 (1991)..... 11

Malley v. Briggs, 475 U.S. 335 (1986).....9, 11

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2

Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991).....2, 8-10

Turner v. Safley, 482 U.S. 78 (1987)..... 12

Statutes

United States Code, Title 42

§ 1983.....1, 9

United States Constitution

First Amendment..... 2

Sixth Amendment 2

Eighth Amendment..... 2

Ninth Amendment..... 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY MELENDEZ LONGORIA, Plaintiff/Appellee, v. ROBERT G. BORG, Warden, et al., Defendant, and BERNIE AISPURO, Warden, Defendant/Appellant.	)	No. 93-15573 DC CV-89-0854 WBS

APPELLANT'S BRIEF ON APPEAL

STATEMENT OF JURISDICTION

A. District Court Subject Matter Jurisdiction

Subject matter in the district court was premised upon 42 U.S.C. § 1983. Plaintiff filed a complaint on June 19, 1989, claiming, among other things, that the integrated yard policy at California State Prison-Corcoran constituted cruel and unusual punishment. Plaintiff sued, among others, defendant Aispuro, the Warden of California State Prison-Corcoran.

B. Finality of Judgment

On February 23, 1993, the District Court Judge denied defendant Aispuro's renewed motion for summary judgment and denied defendant Aispuro qualified

immunity (CR 151). Defendant filed a timely notice of appeal on March 23, 1993.

C. Appellate Jurisdiction

The Appellate Court has jurisdiction over this interlocutory appeal pursuant to the collateral order doctrine. See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Romero v. Kitsap County*, 931 F.2d 624, 626 (9th Cir. 1991).

ISSUES PRESENTED FOR REVIEW

Whether defendant Aispuro is entitled to summary judgment based on qualified immunity as to plaintiff's claim that the integrated exercise yards at California State Prison-Corcoran constituted cruel and unusual punishment.

STATEMENT OF THE CASE

A. Procedural History

On June 19, 1989, plaintiff filed his complaint in this matter claiming that his constitutional rights were violated under the First, Sixth, Eighth and Ninth Amendments by his placement and retention in security housing based on his affiliation with a prison gang, the Mexican Mafia (EME). CR 1. Plaintiff named the following persons as defendants: Robert Borg, Warden of Folsom Prison; Bernie Aispuro, Warden of Corcoran State Prison; Michael Yarborough, former Acting Program Administrator at Folsom; Robert Castro, former Program Administrator at Folsom; Stephen Wohlwend, former Correctional Counselor II at Folsom; Theodore Zink, former Program

Administrator at Folsom; and David Escoto, former Associate Warden at Folsom. CR 1.

Defendants Borg, Wohlwend, Castro, Zink, Escoto and Aispuro filed their answer on September 18, 1989. CR 5. Defendant Yarborough filed his answer on April 17, 1990. CR 19.

On June 11, 1991, defendants filed a motion for summary judgment. CR 60. Plaintiff filed opposition on July 9, 1991 (CR 73), and defendants replied thereto on July 16, 1991. CR 74. On August 28, 1991, the assigned magistrate filed findings and recommendations that the motion for summary judgment be granted in favor of all defendants except Aispuro and Zinc. CR 82. Plaintiff filed objections thereto on September 25, 1991 (CR 89), and defendants filed objections and a motion for reconsideration on October 4, 1991 (CR 91). Plaintiff filed a response to defendants' objections on October 28, 1991 (CR 101), and defendants filed a response to plaintiff's reply to defendants' objections on November 1, 1991 (CR 102). On November 26, 1991, the District Court Judge ordered that defendants' motion for summary judgment be granted with respect to all defendants except Aispuro, and that defendant Aispuro's motion be granted with respect to all claims except those claims that deal with his policy of an integrated exercise yard; and that the order is without prejudice to the right of defendant Aispuro to present a renewed motion for summary judgment. CR 113.

On December 13, 1991, defendant Aispuro filed his renewed motion for summary judgment (CR 114). On September 10, 1992, the magistrate recommended that

defendant Aispuro's renewed motion for summary judgment be denied (CR 139). Defendant Aispuro filed objections to the recommendation on September 25, 1992 (CR 141). A response was filed by plaintiff on October 19, 1992 (CR 142).

On November 5, 1992, the District Court Judge ordered defendant Aispuro to file a supplemental memorandum of points and authorities addressing the issue of qualified immunity (CR 143). Defendant Aispuro filed such supplemental memorandum on December 4, 1992 (CR 144). Plaintiff filed opposition thereto on January 21, 1993 (CR 148). Defendant replied on January 29, 1993 (CR 149), and plaintiff filed a response to defendant's reply on February 11, 1993 (CR 150). On February 23, 1993, the District Court Judge denied defendant Aispuro's renewed motion for summary judgment and denied defendant Aispuro qualified immunity. CR 151.

On March 23, 1993, defendant Aispuro filed a timely notice of appeal.

STATEMENT OF FACTS

The issue presently before the court is whether or not defendant Aispuro, the former Warden of Corcoran State Prison (Corcoran), is entitled to summary judgment based on qualified immunity. During defendant's tenure as Warden, Corcoran had an integrated yard policy for inmates housed in the Security Housing Units (SHU). This meant that inmates were not separated out for yard exercise according to gang affiliation. Thus, an inmate would be offered the opportunity for yard exercise in a

yard where other inmates from different gangs might also be exercising.

The exercise yards for the SHU inmates at Corcoran State Prison are pie-shaped, and each is approximately 1,577 square feet in area.[1] Each yard was surrounded by a high cement wall capped by barbed tape. For outdoor exercise in the yards, inmates were released in groups according to their sections. Not all inmates offered yard exercise always went to the yard. The yard groups varied in number up to about 20 inmates. Consistent with the cell assignments, the yard groups included a mixture of inmates of different racial or ethnic backgrounds, including members or affiliates of various gangs, and including inmates who were not affiliated with any gang. Before being released to the yard, and before being returned to the unit from the yard, each inmate was given an unclothed body search and a metal detector search.

When occupied, each yard was under continuous surveillance by a gun officer in the control room immediately above the entrance to the yards. This gun officer was armed at all times with a rifle, and at all times had immediately available to him tear gas grenades and shells which discharged non-lethal wooden baton blocks. The tear gas and the wooden blocks were discharged via a 38mm gun. The standard procedure on the SHU exercise yards in the event of a fight between inmates was for the yard officer to fire the 38mm gun once, discharging tear

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[1] The facts presented here are a portion of the Statement of Undisputed Facts taken from defendant Aispuro's Renewed Motion For Summary Judgment (CR 114), and authority for each fact is referenced in such motion.

gas or wooden blocks, then drop it and unsling and ready the H & K rifle which fired 9mm bullets. Usually, once the 38mm gun was discharged, inmates would drop to the ground knowing that the H & K rifle was now at the ready. This generally meant that fights were over after a few punches. As a consequence, injuries from inmate altercations on the SHU yard tended to be superficial. It was rare for serious injuries to occur on the yard. For example, the injuries suffered by plaintiff as a result of the SHU yard altercations of which he complains (on 2/16/89, 3/21/89, 6/12/89, 7/17/89, and 7/30/89) were nonexistent or minor. No medical treatment was indicated in four of the incidents (3/21/89, 6/12/89, 7/17/89, and 7/30/89). The only treatment for the February 16, 1989, incident was to cleanse the area and apply cool compresses.

When occupied, each yard was also under continuous surveillance by a video camera connected to an operating video recorder, and a video display screen in the control room. This meant that the aggressor and/or participants in any fight could be easily identified by reviewing the videotape, if necessary. Consequently, because of the small yard under constant surveillance, the chance of altercations going unnoticed by staff was almost nonexistent.

Some inmates exercised in very small groups or exercised alone (controlled yard status) because they had been persistent aggressors on the exercise yard, or because of other case factors which dictated that they be handled protectively. Known enemies were not released to the same yard together, they were not celled together, and were not celled in the same tier, or same section.

Such an enemy would be an individual whom the inmate specifically identified, such as by name and prison number. Also, the inmate would have to specify the nature of his problem with the other inmate to establish why he regarded the other inmate as his personal enemy. It was not enough in this context for one inmate merely to state that he was a member of a prison gang; that the other inmate was a member of another prison gang and that the gangs regard themselves as rivals. It was standard practice for an inmate being disciplined for fighting to be asked at the disciplinary hearing if the other inmate participant was an enemy. If an inmate indicated that the fight was the result of an enemy situation, then those two inmates would be housed so that they would not again go to the yard together. An inmate could request controlled yard status at any time. This was done by the inmate asking his counselor to schedule him for committee review. An inmate could also ask the SHU Lieutenant to schedule him for committee. The committee would then talk to the inmate about the request and determine if there was a need for controlled yard status. Plaintiff did not request controlled yard status until September 1, 1989, when he appeared before the committee reviewing his 90 day credit loss for being the aggressor in a physical altercation on the SHU yard. Plaintiff received controlled yard status on September 1, 1989, and remained on such status until November 16, 1989. Plaintiff was transferred to Pelican Bay State Prison on March 12, 1990.

In 1989, during the time that plaintiff was incarcerated at Corcoran, it was generally known among SHU staff that the Nuestra Familia prison gang was purposefully instigating violence among SHU inmates in an

attempt to force Corcoran to abandon the SHU gang integrated yards and establish SHU gang segregated yards.[2]

STANDARD OF REVIEW

A district court's denial of a qualified immunity defense is reviewed de novo. *Baker v. Racanisky*, 887 F.2d 183, 185 (9th Cir. 1989).

ARGUMENT

I

DEFENDANT AISPURO IS ENTITLED TO QUALIFIED IMMUNITY SINCE THE LAW ALLEGEDLY VIOLATED WAS NOT CLEARLY ESTABLISHED

Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). In *Malley v. Briggs*, 475 U.S. 335, 341 (1986), the court noted that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." The plaintiff in a § 1983 action bears the burden of proving that the right allegedly violated was clearly established at the time of

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[2] Plaintiff was placed in SHU while at Folsom Prison based on confidential information that he is an associate of the Mexican Mafia prison gang.

the official's allegedly impermissble conduct. *Elder v. Holloway*, 975 F.2d 1388 (9th Cir. 1992); *Romero*, 931 F.2d at 627.

When a law enforcement officer asserts qualified immunity, the district court must determine whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful. This standard requires a two part analysis: (1) Was the law governing the officials conduct clearly established?; (2) Under that law, could a reasonable officer have believed the conduct was lawful?. *Act Up!/Portland v. Bagley*, 1993 U.S. App. LEXIS 2019; 93 Daily Journal D.A.R. 1921 (9th Cir. 1993); *Hemphill v. Kincheloe*, 987 F.2d 589, 592 (9th Cir. 1993); *Romero*, 931 F.2d at 627.[3]

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[3] *Romero* sets forth three inquiries by splitting the second question into two parts: the determination of whether the specific right violated was so clearly established as to alert a reasonable officer to its constitutional parameters; and the ultimate determination of whether a reasonable officer could have believed the particular conduct at issue was lawful. However, since in the present case, plaintiff has failed to meet his burden of showing that the law was clearly established, defendant does not address this bifurcation of the second issue.

We also note that *Romero* involves the arrest of members of an Indian tribe for the unlawful gathering of shellfish and concerned rights to shellfish in nonreservation areas, and does not involve a Fourth Amendment question. We point this out since the district court decision seems to imply that the matter of qualified immunity can be decided by the court as a matter of law only within the context of Fourth Amendment cases. CR 151, p.7-8.

Anderson v. Creighton, 483 U.S. 635, 639-640 (1987), instructs that the right the official is alleged to have violated must have been "clearly established" in a *particularized sense*: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [That] is to say that in the light of preexisting law the unlawfulness must be apparent."[4]

The operation of the "clearly established" standard:

> [D]epends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no mattter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any

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[4] The court also discussed that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that the actions they take are lawful and that in such cases these officials should not be held personally liable. *Anderson* at 641. The court has recently reaffirmed its position in *Hunter v. Bryant*, ___ U.S. ___; 112 S.Ct. 534, 537; 116 L.Ed 2d 589 (1991), noting that the doctrine of qualified immunity allows for accommodation for reasonable error. The *Hunter* court quoted its earlier decision in *Malley* in noting that "the qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " Consequently, as recently stated by the 9th Circuit, officials pleading qualified immunity are liable for damages only if the contours of the right they are alleged to have violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991).

> other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness: that is the touchstone of *Harlow*.

Anderson, 483 U.S. at 639.

The relevant, properly particularized question, *see id.* at 640, is whether it was clearly established that inmates are entitled to exercise exclusively with other inmates affiliated with the same gang.

A prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). It was not clearly established at the relevant time, nor is it now, that a prison policy which established gang integrated exercise yards is unconstitutional.[5] Plaintiff has not cited, nor did the district court discover, a single case indicating otherwise. Consequently, defendant Aispuro is entitled to qualified immunity.

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[5] A contrary determination is to say that the law was clearly established that a prison must segregate prisoners for exercise by gang affiliation. This result would be exactly what gangs hope for in order to increase their power. In addition, the effect of such policy would be enforced racial segregation in housing and on the yard since prison gangs are almost exclusively ethnic (e.g. Black Guerilla Family, Aryan Brotherhood, Mexican Mafia).

II

THE POLICY ESTABLISHING INTEGRATED YARDS WAS A REASONABLE POLICY DESIGNED TO DECREASE GANG POWER

However, assuming arguendo that established law was that prison exercise yards must be segregated according to gang affiliation, the question would become whether or not a reasonable officer could have believed his conduct was lawful. Under this second part of the test, if a reasonable warden could have believed that establishing an integrated yard would lead to greater security and safety for all inmates and staff, then qualified immunity applies.

As the declaration of defendant Aispuro (attached to CR 144) indicates, the concept of gang integrated yards at Corcoran was initiated when the Corcoran SHU facility was in the planning stages. The Department of Corrections monitored statewide prison gang activity and was acutely aware of serious gang related problems at various institutions throughout the state. The concept of gang integrated SHU yards was viewed as one way to combat the increasing institutional gang violence. Executive staff at Corcoran developed the methodology for operation of the SHU integrated yards and converted the concept to a policy that was implemented with the opening of the SHU facility in December of 1988.

Prison gangs use the yards for such gang activities as the maintenance of internal discipline and cohesiveness; the recruitment of new members; the training in particular gang activities such as modes of assault, modes of

smuggling, weapons manufacturing, and modes of passing messages; "schooling" in gang lore and discipline; passing the word with respect to past and future gang activities, the status of members and leaders of the gang, and other organizational information; and the planning of particular gang criminal activities. These activities are made much more difficult by implementation of a policy of mixing yards and scattering gang members. The SHU integrated yards also provided an opportunity for SHU inmates to show they would be able to function in an integrated general population setting if released from SHU. For inmates who claimed to be gang drop outs, the integrated yards provided an opportunity for the inmate to show he could get along in a gang integrated setting and for staff to observe the inmate's functioning in an integrated setting and whether the inmate's activity exhibited gang affiliation or substantiated the claimed defection.

Defendant Aispuro instituted the policy in an attempt to control gang activity,[6] and to deter the recruitment and consolidation of gang power by limiting the

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[6] The declarations filed with defendant's renewed motion for summary judgment (CR 114) explain the statewide shutdown of certain Level IV facilities and consequent transfer of inmates to the more modern and better equipped institutions. Corcoran was the first institution specifically designed to handle a large SHU population, and was targeted to receive an influx of SHU inmates, many of whom would only be held there until the most high tech and secure institution, Pelican Bay, was open and available for housing the systems most violent and hard to control offenders. See especially the declaration of Steve Cambra (Exhibit A attached to CR 114). A copy of the Cambra declaration is also attached to CR 144.

opportunity for meeting, planning, training, and exhibiting displays of strength or influence.

In addition, as the first declaration of Larry Small explained (attached to CR 144), the yards were small and extremely secure, with inmates strip searched and examined with a metal detector before entry, and with constant gun and video camera surveillance. Another consideration was that segregating yards by gang affiliation would have had the effect of instituting racially segregated housing in this large SHU facility[7] since prison gangs are formulated along ethnic lines and yards are strictly tied to housing for reasons of institutional security. (See the second declaration of Larry Small which was Exhibit C of defendant's renewed motion for summary judgment (CR 114).)

At the time the integrated yard policy was instituted at Corcoran it was known within the Department and at Corcoran that housing gang members together and allowing them to exercise together had the effect of abetting gangs in maintaining their organization and cohesiveness. This also had an indirect effect of abetting recruitment of new members, as inmates could be assigned to the unit on a good faith and reasonable, but nevertheless mistaken, belief that they were members or associates of a gang. If they were not members when they came into the unit, the pressures were great for them to become members. Gangs desire and regard as important to their

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[7] During 1989, the daily average SHU population at Corcoran was 1,134. See Exhibit B Attached to Renewed Motion for Summary Judgment filed December 13, 1991 (CR 114).

activities, the creation of yards segregated by gang membership or affiliation.

As the declaration of Mr. Small indicates, implementation of the integrated yard policy at Corcoran has benefited the inmate population as well as the Department of Corrections itself. The rate at which gang members have stated they want to drop out of the gangs, and have requested participation in the debriefing process which the Department uses to accomplish this purpose and to prepare the inmates for return to general population, has significantly escalated. Also, the rate of recruitment of new members has dropped.

In addition, segregating yards by gang affiliation does not at all guarantee that there will be an end to violence on the yards since some of the most violent, vicious and fatal altercations have occurred during fights between members of the same gang because of the failure of a particular gang member to carry out an order or directive of another gang member of superior rank. Also, rivalries, alliances, and animosities frequently change between gangs, between factions of the same gang, and within a gang or faction. If segregation of yard groups by gang membership or affiliation was instituted, the prison would constantly be subject to manipulation of housing and yard assignments by the gangs. Also, given the number of yards available at Corcoran SHU, there are too many gangs and gang factions to afford each a separate yard and also to have available yards for non-affiliated inmates who form the majority of the SHU prisoners.

As is evident from the above discussion, the integrated yard policy was carefully planned out with

numerous design and procedural protections to provide for the safety of inmates on the yard. In addition, it was a carefully considered way to increase the overall safety for non gang affiliated SHU inmates and general population inmates, as well as staff, by eroding the cohesiveness and power of the various prison gangs which were becoming continually more powerful throughout the statewide prison system. Defendant Aispuro was not "plainly incompetent" in implementing such policy, nor did he "knowingly violate the law." Since a reasonable warden could have believed that establishing an integrated yard would lead to greater security and safety for all inmates and staff, defendant Aispuro is entitled to qualified immunity.

CONCLUSION

For the reasons stated herein, defendant respectfully requests that judgment be ordered granting his motion for summary judgment on grounds of qualified immunity as to the claim of violation of plaintiff's right to be free from cruel and unusual punishment.

DATED: May 7, 1993

Respectfully submitted,

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STATEMENT OF RELATED CASES

Per Circuit Rule 28-2.6, the undersigned, counsel of record for Defendant-Appellant, hereby certifies that there are no known related cases which could be substantially affected by the outcome of this particular case.

/s/ Kathleen E. Gnekow
KATHLEEN E. GNEKOW
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